FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 178

R. E. PECKHAM, Assignee for the Creditors of The Meyer-Kiser Bank, succeeding Thomas E. Garvin, Receiver of The Meyer-Kiser Bank,
and
R. E. PECKHAM, Trustee,

Petitioners,

vs.

FAMILY LOAN COMPANY, a corporation;
FERD S. MEYER, otherwise known as Ferdinand S. Meyer;
FERDINAND S. MEYER, Trustee, otherwise known as Ferd S. Meyer, Trustee;
ROSALYN A. MEYER, otherwise known as R. A. Meyer;
JAMES MEYER;
JAMES MEYER, Trustee;
HOKE T. MAROON, otherwise known as H. T. Maroon;
H. T. MAROON, Trustee, otherwise known as Hoke T. Maroon, Trustee;
SEABOARD FINANCE COMPANY OF FLORIDA, a corporation;
SEABOARD FINANCE COMPANY, a Delaware corporation;
TOWN FINANCE COMPANY, INC., a corporation.

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Fifth Circuit

(Opinions below are Appended Hereto)

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named Petitioner respectfully petitions this Court to issue its Writ of Certiorari to said Court of Appeals to review this case, and shows:

Opinions Below.

The opinion of the District Court (S.D. Fla. Miami Division), set forth in the Appendix hereof at page A1 *et seq.*, is reported in:

Peckham v. *Family Loan Co.* (1957) 169 F.Supp. 52.

The opinion of the Court of Appeals is set forth in the Appendix hereof at page A13 *et seq.* It is reported in:

Peckham v. *Family Loan Co., et al.* (5 Cir., 1959) 262 F.2d 422.

Grounds for Invoking this Court's Jurisdiction.

Petitioner's timely filed petition for rehearing was entertained and was denied by the Court of Appeals on April 3, 1959.

This Petition, filed 90 days thereafter, invokes this Court's general jurisdiction to review final judgments of the Courts of Appeals under 28 U.S.C. 1254(1).

Petitioner seeks to invoke this Court's "supervisory powers" for reasons set forth *infra*.

Supreme Court Rule 19(b).
Western Pacific R. Corpn. v. *Western Pacific R. Corpn.* (1952) 345 U.S. 247, 262, 73 S.Ct. 656, 662-663, 97 L.Ed. 986.

Questions Presented for Review.

Petitioner was the unsuccessful plaintiff-appellant in the Courts below, in a creditor's suit seeking to reach assets allegedly concealed by the respondents-defendants in a fraudulent conspiracy.

He does not ask this Court to review the merits of the evidence, findings of fact or conclusions of law in the District Court.

He claims that the special Judge of the District Court (S.D. Fla. Miami Division) exhibited strong *bias and prejudice* throughout the trial, against him and in favor of the defendants, which prevented him from having a fair trial; and that the Court of Appeals, in effect, glossed over this error in its opinion and failed to decide it, though urged in his appellant's brief and also in his petition for rehearing. Accordingly, the questions he presents to this Court are:

(1)

Petitioner's request that this Court may remand the case to the Court of Appeals with directions to specifically *decide* the error he alleges,—that the District Judge's bias and prejudice precluded him from having a fair trial and that a new trial should be ordered for that reason.

If this Court determines to remand the case on this ground, the next question (2) presented by this Petition will become moot so far as this Petition is concerned.

(2)

Petitioner's contention that if the Court of Appeals' opinion be construed as an adequate review and a decision against him on this asserted error of bias and prejudice of the District Judge,—then the Court of Appeals has erred on this point, and Petitioner should have remedy by this Court's reversal with directions to the Court of Appeals to order a new trial on this ground.

Statement of the Case.

In view of the nature of the "Questions Presented for Review," little more needs to be said here than is indicated in the opening paragraph under that heading, *supra*.

Petitioner (plaintiff-appellant below), as trustee for creditors of the defunct Meyer-Kiser Bank of Indianapolis, holds a judgment now totaling more than $1,500,000 against *Sol* Meyer (deceased) and another judgment which he holds in a related capacity against Sol's living son Ferd S. Meyer in the total sum of about $300,000.

He brought this creditor's suit in the District Court under the diversity jurisdiction, alleging in his complaint on the Sol Meyer judgment, and in his subsequent intervening claim on the Ferd Meyer judgment, that the defendants (Ferd, his wife, son and business associates) were and are engaged in a fraudulent conspiracy to thwart collection of these judgments by means of manipulating and concealing capital stock and debentures of defendant Family Loan Company, which securities are equitably the property of said Sol and Ferd S. Meyer and hence should be subjected to these judgments.

In the course of making up the issues in the District Court, petitioner encountered two successive and erroneous adverse rulings which in effect threw him out of court.

He appealed successfully in each instance and obtained reversals from the Court of Appeals (5th), but this consumed five years of time (1949-1954) and much labor and expense in order to stay in the District Court. These appeals are:

(1) Petitioner's appeal from the District Court's erroneous dismissal of his complaint seeking to collect the Sol Meyer judgment:

Peckham v. *Family Loan Co.* (5th Cir., 1952) 196 F.2d 838.

(2) Petitioner's appeal from the District Court's subsequent erroneous judgment throwing out his claim seeking to collect the Ferd Meyer judgment:

Peckham v. *Family Loan Co.* (5th Cir., 1954) 212 F.2d 100.

A full statement of the issues will be found in the latter opinion. See in particular the closing paragraphs of the opinion indicating the complicated and serious issue of alleged fraudulent conspiracy by the defendants, and remanding the case for a full trial (which Petitioner now claims he was subsequently deprived of).

There was no petition for writ of certiorari from either of the above decisions.

After remand from the last appeal, *supra*, supplemental issues were made up by plaintiff's supplemental pleadings alleging that during the pendency of said last cited appeal (212 F.2d 100) the defendants-appellants had converted the *res* which was the *subject matter* of plaintiff's suit, the Family Loan Company stock, by *exchanging* it for a *new issue* of capital stock of *Seaboard Finance Company*. This was done without applying to, or informing the Court of Appeals. Seaboard and related concerns were made supplemental defendants on the charge that from the time of this exchange of stock they aided and abetted the conspiracy of the original defendants.

Printed R. 12-17.

This exchange of stock, which converted the subject matter of the suit from the original Family Loan Company stock to Seaboard stock, was also accompanied by submitting to the *Securities and Exchange Commission* and the *New York and Los Angeles Stock Exchanges*, a contract for exchange of stock between the original defendants and Seaboard containing the false and unexplained recital that there was *no litigation pending* affecting said Family Loan Company *stock*, when in fact all the parties to the transaction (original defendants and Seaboard) knew that said last cited appeal was then in progress.

Printed R. 37-43, 65-69.

These supplemental issues relating to Seaboard and the S.E.C. and stock exchanges are not directly here now for review, but need to be mentioned as showing *the broad and serious character of the issues and charges which the Petitioner asserts were smothered* both in the District Court and the Court of Appeals by the errors here complained of.

The course and nature of the alleged *prejudged attitude* of the trial Judge, and the alleged *abortive trial and miscarriage of justice* resulting therefrom, are illustrated in the last part of the Appendix hereof "Excerpts from Trial Record".

Appendix hereof, A19-A43.

ARGUMENT—

GROUNDS FOR ALLOWANCE OF WRIT.

Summary.

I.

Summary remand should be made by this Court to the Court of Appeals with directions to decide the *basic* and *determinative* error allegedly involved in the appeal,—that bias and prejudice of the trial Judge *throughout the trial* rendered the trial abortive and unjust and requires a new trial.

The Court of Appeals' opinion in effect *fails to discharge its duty to decide this question*, because:

A.

The opinion *glosses over* the alleged bias and prejudice of the trial Judge by treating it in terms of mere *incidental* trial rulings, which, if that were the actual situation, would warrant only a superficial review by the Court of Appeals (which is all it received), and which obviously would preclude the plaintiff-appellant from obtaining a Writ of Certiorari from the Supreme Court.

B.

And what is more serious, the Court of Appeals' opinion does not *disclose* this *underlying* and serious question,—the appellant's assertion that he was aggrieved *not* by *incidental* trial rulings of an ordinary fair Judge, but by the *continual* effect of a *prejudiced state of mind* in the trial Judge, of which the specific rulings were mere harmful *symptoms*.

C.

The legal consequence of the above default by the Court of Appeals, as Petitioner understands the law, is:

Default by a Court of Appeals in discharging its statutory duty and function of deciding alleged errors presented, will ordinarily result in a summary order by the Supreme Court to decide the question, without the Supreme Court going into the merits of the omitted question.

Such a summary order will issue both in discharges of this Court's "*responsibility*" to "*supervise*" the orderly administration of justice in the lower federal courts:

> Supreme Court Rule 19(b).
>
> *Western Pacific R. Corpn.* v. *Western Pacific R. Corpn.* (1953) 345 U.S. 247, 73 Sup. Ct. 656, 662-663, 97 L.Ed. 986;

and also to carry out the purpose of the statute creating the certiorari procedure,—that the Supreme Court should not be burdened in the first instance by default of the Courts of Appeals in failing to fairly and adequately decide questions properly presented to them (whether this fault be a total one as in the case cited *infra*, or a semi-total one as in this case by glossing over and failing in effect to decide an *underlying* and *determinative* question):

> *Anderson* v. *Atherton* (1937) 302 U.S. 643, 58 S. Ct. 53.

If Petitioner be correct in the foregoing ground I, this renders ground II, *infra*, moot.

II.

If the Court of Appeals opinion adequately decides this question of the alleged underlying bias and prejudice of the trial Judge,—then Petitioner urges that its decision is wrong, and wrong on a matter sufficiently important to merit the Supreme Court's attention and remedy, because:

While the factual and legal merits of the case are *not* here for review *as such*, it is proper for this Court to *briefly* notice the Trial Transcript, which has been certified up, sufficiently to see that from the *beginning* to the end the trial was saturated with *prejudice* of the trial Judge against this Petitioner-plaintiff and *sympathy* in favor of these Respondents-defendants, sufficient to make the trial abortive:

Appendix hereof, A19 to A43.

When such a situation appears in the record on appeal, *reversal by the Court of Appeals, for a new trial, is required.* The Court of Appeals (or the Supreme Court when the matter is before it) will not proceed further to inquire whether or not particular *rulings* by a *prejudiced* Judge were correct. The reason is obvious:

N.L.R.B, v. *Phelps* (5th Cir., 1943) 136 F.2d 562, 563-4, 566-7.

Knapp v. *Kinsey* (6th Cir., 1956) 232 F.2d 458, 465, 466-7. Cert. den. 352 U.S. 892.

In re Murchison, 349 U.S. 133, 135, 75 S.Ct. 623, 99 L.Ed. 943.

Ancillary to the last proposition is the point (not so far disputed by the Court of Appeals or the Respondents-defendants) that the operation of the above proposition is not abated or affected by the fact that the aggrieved

party failed to file an affidavit under *28 U.S.C. 144* to disqualify the Judge, where his prejudice "was first disclosed during the trial":

> *Knapp* v. *Kinsey, supra, rehearing* opinion, (6th Cir., 1956) 235 F.2d 129, 131.

This point is particularly applicable here, where the record shows that this trial Judge entered the case as special Judge, a *stranger* to this Petitioner-plaintiff, on the morning the trial started. (See Appellant's Brief, Appendix B, designated to be certified up with the Record).

Elaboration of Argument.

I.

Court of Appeals' Default in Failing in Effect to Consider Question of Trial Judge's Prejudice.

Neither the Court of Appeals or the Respondents-defendants have yet contended, or could contend that this question was not presented and urged to the Court of Appeals.

Appellant's Brief in the Court of Appeals (copies of which he has designated to be certified up to this Court with the Record) sets forth under "Specifications of Errors":

> "Error and prejudice committed and exhibits by the Trial Judge in favor of the defendants and against the plaintiff-intervenor, from near the beginning to the end of the trial, which rendered a fair, impartial and adequate trial and decision impossible. More specifically. • • •"
>
> Appellant's Brief, 30.

Again Appellant's Brief in the Court of Appeals set forth under "Argument", the bold face heading:

> "Adverse Attitude of Trial Judge Made a Fair and Adequate Trial Impossible" (followed by detailed argument).
>
> Appellant's Brief, 48.

The only substantial parts of the Court of Appeals' opinion dealing with the trial Judge's attitude and conduct of the trial are:

> "The contention upon which the appellant places the *greatest stress* is that he was denied a fair and adequate trial by the court's refusal to grant *continuances*, the court's refusal to allow prolonged *questioning* of witnesses, and the court's refusal to require *production* of documents." (Our italics)
>
> Appendix hereof, A14.
>
> "The appellant asserts that he was harassed and belittled by the court. He points to the pages of the record where the court *commented* upon the time consumed by the appellant in developing *immaterial* evidence, and to the court's refusal to permit continued questioning of witness as to matters *previously covered* in detail." (Our italics)
>
> Appendix hereof, A17.

In addition, Petitioner filed a petition for rehearing, with brief appended, which again urged this error to the Court of Appeals in more detail, including citation of the same cases cited under II *infra* of this Petition. But the Court of Appeals denied it without opinion.

As already pointed out under "Summary", proposition I, *supra*, the Court of Appeals' opinion *in effect* defaults its duty to review and decide this basic question of prejudice of the trial Judge by:

(1) Treating the question as one of *incidental trial rulings, and*—

(2) Glossing over, obscuring and ignoring the basic question of *underlying prejudice* of the trial Judge, of which the rulings were but symptoms.

(3) Ignoring the *legal consequences* of this distinction. Incidental trial rulings by an *un*prejudicial Judge seldom merit reversal, because usually they are *discretionary*. But a *prejudiced state of mind* in a trial Judge, if shown in the trial record, *requires* reversal regardless of whether he exercised his (biased) discretion right or wrong in the particular ruling. (See cases under II, *infra*).

II.

Record Facts Show Trial Judge's Prejudice in This Case, and Law Requires Reversal.

If the above proposition I be well taken,—that the Court of Appeals in effect failed to discharge adequately its statutory duty (owed both to this Petitioner, to the Supreme Court and to the Government) to review and decide this basic question of *prejudice* of the trial Judge, then there should be a summary order requiring the Court of Appeals to perform this function, and this proposition II becomes moot so far as the present Petition is concerned.

See authorities under I in Summary, *supra*.

Petitioner's Right to Have a Fair and Unprejudiced Trial Judge Is Fundamental.

This Court of Appeals, in the following case relating to a trial examiner of the N.L.R.B., but equally applicable to a District Court Judge, said:

"* * * a fair trial by an unbiased and non-partisan trier of the facts is of the *essence* of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a *court* by a *judge*. * * * Nor will the fact that an examination of the record shows that there was evidence which *would* support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, *its effect remains throughout the whole proceeding*. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and *vitiates all of the proceedings*, and *no* judgment based upon them may stand.

* * *

"We cannot agree with the conclusion of the Board that respondents have had the fair trial by a disinterested and impartial trier of facts which the law accords them. Whatever ought to be said of the examiner's *persistent* and *partisan* efforts to conduct the proceedings to a decision favorable to the Board, if the examiner had been really in the position he assumed that he was in of an agent for the Board to sustain its charges, it cannot be successfully denied that his *general attitude* was not impartial but partial, not disinterested but *partisan*. * * *" (Our emphasis).

N.L.R.B. v. Phelps (5 Cir. 1943) 136 F.2d 562, 563-564, 566-567.

This Court of Appeals followed and quoted the first part of the above language, as being "well said" in *N.L.R.B.* v. *National Paper Co.* (5 Cir. 1954) 216 F.2d 959, 968. The same language was also followed and quoted in *Local No. 3 etc.* v. *N.L.R.B.* (8 Cir. 1954) 210 F.2d 325, 330.

The following case, not involving the N.L.R.B., was a large stockholder's suit, somewhat comparable in general scope to our case. No affidavit of bias and prejudice was filed below, but the Court of Appeals reviewed the question of the District Judge's prejudicial conduct in the trial, basing the review upon fundamental principles of due process, as did this Court in the above quoted *N.L.R.B.* v. *Phelps*, 136 F.2d 562, and citing the *Phelps* case. The Court said:

> "One of the fundamental rights of a litigant under our judicial system is that he is entitled to a *fair trial* in a *fair tribunal*, and that fairness requires an absence of actual bias or prejudice in the trial of the case. *In re: Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942; *Talbert* v. *Muskegon Construction Co.*, 305 Mich. 345, 348, 9 N.W. 2d 572. If this *basic principle* is violated, the judgment *must* be reversed. *In re: Murchison, supra; Berger* v. *United States*, 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481; *Moskun* v. *United States*, 6 Cir., 143 F. 2d 129, 130; *N.L.R.B.* v. *Phelps*, 5 Cir., 136 F. 2d 562.
>
> "Bias or prejudice on the part of a judge may exhibit itself prior to the trial by acts or statements on his part. Or it may appear during the trial by reason of the actions of the judge in the conduct of the trial. If it is known to exist before the trial it

furnishes the basis for disqualification of the judge to conduct the trial. Section 144, Title 28, U.S. Code. This section provides: * * * This statutory provision is not directly applicable to proceedings wherein the claimed bias or prejudice appears *during* the course of the trial. However, there would seem to be close analogy between bias and prejudice which would disqualify a judge from sitting in a judicial proceeding and the bias or prejudice appearing *during* the course of the proceedings which would render the *judgment* therein invalid. * * *

* * * *

"In our opinion, the conduct of the District Judge did not conform to the standard required by the foregoing authorities. Whether unconsciously or otherwise, he failed from the start of the trial to view this case with the impartiality between litgiants that the defendants were entitled to receive. His active participation in the case and in the questioning of witnesses exceeded what was reasonably necessary to obtain a clear understanding of what their testimony was and *fully justifies* appellants' complaint that at times 'he, figuratively speaking, *stepped down* from the bench to *assume the role of advocate* for the plaintiff.' Although appellees' counsel did not ask or need such assistance, and apparently at times realized the possible prejudice to their cause; the prejudicial effect to appellants' rights requires a reversal of the judgment. *Appeal of United States Securities and Exchange Commission, supra,* 6 Cir., 226 F. 2d 501, 519, 520; *Berger* v. *United States, supra,* 255 U.S. 22, 41 S. Ct. 230; *Crowe* v. *Di Manno, supra,* 1 Cir.,

225 F. 2d 652, 659; *Whitaker* v. *McLean, supra,* 73 App. D.C. 259, 118 F. 2d 596; *N.L.R.B.* v. *Phelps, supra,* 5 Cir., 136 F. 2d 562.

"The judgment is reversed and the case remanded to the District Court for a retrial before another Judge." (Our emphasis).

Knapp v. Kinsey (6 Cir., 1956) 232 F.2d 458, 465, 466-7. Cert. den. 352 U.S. 892.

In the last quoted case, there was a later supplemental opinion on a petition for rehearing and to re-tax costs. The Court said:

"In our opinion, *Section 144,* Title 28 U.S. Code was *not applicable* to *this* case in which the claimed bias or prejudice was first disclosed *during* the trial. Under the circumstances the remedy cannot be by a change of judges during the trial; it necessarily becomes *a matter of alleged prejudicial error* and for correction by the Court of Appeals. *Moskin* v. *United States,* 6 Cir., 143 F. 2d 129; *United States* v. *Flegenheimer,* D.C. N.J., 14 F. Supp. 584, 591. We do not agree with appellees' contention that the issue was not timely raised and preserved by appellant during the trial in the District Court."

Knapp v. *Kinsey* (6 Cir. 1956) 235 F. 2d 129, 131.

Questions on the Merits in the District Court Become Moot.

This is the first, and if well taken, the *only* proposition, which requires the reviewing court's consideration when such an error is assigned as in this appeal. The first paragraph of the above quotation from *N.L.R.B.* v. *Phelps*

(5 Cir. 1943) 136 F. 2d 562 says that wherever prejudice in the trier of the facts "rears its ugly head," this—

> "taints and *vitiates all* of the proceedings, and *no judgment* based thereon may stand." (p. 564 top). (Our emphasis).

In like vein, the first paragraph of the above quotation from main opinion in *Knapp* v. *Kinsey* (6 Cir. 1956) 232 F. 2d 458 cites the *Phelps* case and others and says:

> "If this *basic principle* is violated, the judgment *must* be reversed." (p. 465, 2nd column) (Our emphasis).

No Presumption Against Prejudice.

Necessarily implied in these last two cases, is the proposition that in reviewing this preliminary question of whether the trier of the facts was prejudiced, the Court of Appeals does *not* indulge any presumption that the lower tribunal was unprejudicial, but examines the record and holds the scales *itself* on this point. This is indicated in the above cited but not quoted opinion of this Court in *N.L.R.B.* v. *National Paper Co.* (5 Cir. 1954) 216 F. 2d 859 to the effect that where prejudice had appeared in the conduct of the trial,—

> "the Examiner's report and the Board's findings based thereon are *not* entitled to the usual presumption of correctness," though the opinion goes on to say that this is no reflection on the "competency of the examiner on less provocative occasions." (p. 868, 2d column) (Our emphasis).

Similarly, in the following case a Court of Appeals refused "in the exercise of our sound discretion" to grant its writ of mandamus before trial below to review the correctness of the District Judge's ruling that an affidavit

of bias and prejudice was not sufficient to disqualify him. The Court held that review of the Judge's prejudice or non-prejudice should come up later on appeal from the final judgment below, and that—

> "We think it self-evident that a decision by a reviewing court of *this* legal question would have to stand upon its own merits, *unaided by any presumption.*" (Our emphasis).
>
> *Korer* v. *Hoffman* (7 Cir. 1954) 212 F. 2d, 211, 213, 2d column.

Trial Judge's Erroneous Assumption of the Role of Defense Counsel in This Case.

Please observe that in the last part of the above quotation from the main opinion in *Knapp* v. *Kinsey*, 232 F. 2d 458, the Court said that the conduct of the District Judge during the trial—

> "*fully justifies* appellants' complaint that at times he, figuratively speaking, stepped down from the bench and assumed the role of advocate for the plaintiff." (p. 467, 2nd column) (Our emphasis).

But an examination of the record and opinion in the above case will show that the Judge's conduct in that case was mild, compared to the flagrant and unprecedented assumption of the role of defense counsel in this case.

Like the Judge's prejudiced state of mind, of which this conduct is one of the *symptoms* and *results*, this conduct continued from the beginning to the end of the trial (contrary to the erroneous implications which permeate the opinion to the effect that the Judge's conduct and rulings were *isolated* ones, *late* in the trial, and were *justified* in fact and law).

The parts of the record showing this erroneous judicial conduct of the trial Judge are so *numerous*, from beginning to end of the record, that it would unduly extend this Petition and its Appendix to set forth all of them. The Appendix attempts to set forth adequate *samples* from beginning of the trial to the end.

Appendix hereof, A18 to A43, infra.

From the above cited record, we think it is sufficiently apparent that the Judge not only assumed the role of defense counsel, but did so in *the most erroneous and prejudicial manner*. For instance:

The Judge frequently *interrupted* the train of questions by plaintiff's counsel to the *principal defendants* Meyer and Maroon who were on the stand as important *adverse* plaintiff's witnesses.

The questions interposed by the Judge were *highly improper and leading*, frequently putting answers in the mouths of the witnesses, *eliciting self-serving conclusory answers* in favor of the defendants on the main fact issues in the case.

Appendix, A18, A21, A33-4.

When these witnesses gave answers to the Judge's questions, favorable to plaintiff in spite of the leading questions, the Judge frequently asked questions of a kind which would cure these answers and turn the testimony back in favor of the defendants.

Appendix, A33-4.

Much of this interrogation by the Judge was so leading and improper that any fair Judge would sustain an objection to it if done by *defense counsel*. True, plaintiff's counsel did not enter objections to the Judge's questions. No such duty rested upon him under the circumstances.

What should he do? Object on the ground that the Judge was committing judicial misconduct, a fact which the Judge should already know,—and thereby aggravate the existing hostility of the Judge to plaintiff's counsel and case?

Frequently throughout the trial, the Judge also engaged in the unprecedented practice of *making his own objections* to plaintiff's questions to the defendant-witness (even in the absence of objections to these questions by defense counsel), and there sustaining his own objections.

Appendix, A25, A28, A30.

The Judge frequently expressed his *resentment* at plaintiff's questions to the defendant witnesses Ferd S. Meyer and Maroon, when the questions implied or sought to show fraud on their part, though this was the basic issue in the case.

Appendix, A22-3, A27, A36.

The Judge frequently indulged in *sarcasm* and derogatory statements toward plaintiff's counsel.

Appendix, A27, A33, A34.

Abusive Conduct by Defense Counsel.

Defense counsel, taking their cue from the Judge, and sometimes with his encouragement, frequently indulged in highly improper and derogatory remarks toward plaintiff's counsel.

Appendix, A26-7, A33.

"The Poor Old Man Was Broke."

By the time the *middle* (not the end) of plaintiff's case-in-chief was reached, the Judge was *openly expressing*

his sympathy for the allegedly fraudulent and conniving judgment debtor, Sol Meyer, and had expressly adopted the theory argued by the defendants in their *opening statement* (they later rested without putting on any witnesses):

> "The *poor* old man (Sol Meyer) was *broke*. • • • Now what would you have done under the circumstances. • • •"

Appendix, A35.

To the contrary, see the Indiana court's opinion affirming plaintiff's judgment against Sol Meyer and showing how the "poor old man" misappropriated a million dollars from depositors of the Indianapolis bank of which he was *president*, and took it to Florida: *Meyer* v. *Garvin* (1941) 110 Ind. App. 403, 408, 410-13, 37 N.E. 2d 291.

Trial Judge Arbitrarily Cut Off Plaintiff's Case in Chief.

As a natural culmination of the above prejudiced trial, in which the trial Judge and defense counsel alternately berated the plaintiff and his counsel, and sympathetically pre-judged the case in favor of the defendants, there came the unprecedented action of the trial Judge in:

(1) Refusing to receive plaintiff's expert testimony offered to show that Sol Meyer, "the poor old man", *had secretly held the certificate* for at least 47% of the stock sought to be reached by plaintiff, now worth $1,000,000 or more; and then his son, defendant Ferd S. Meyer, or other defendants, had *concealed* and *switched* this ownership after Sol's death.

Appendix, A37-8.

(2) Arbitrarily closing plaintiff's case-in-chief, refusfusing to permit the Petitioner-plaintiff to conclude his direct examination of a principal defendant (Maroon), and refusing to permit plaintiff to call and examine *at all* as his adverse witnesses, two important defendants (Ferd S. Meyer's wife and son, holders of part of the stock sought to be reached).

Appendix, A38-39, A43.

(3) Then deciding the case without permitting any oral argument (being the logical culmination of the Judge's repeatedly expressed pre-judgment in favor of the defendants).

Appendix, A43.

Conclusion.

Wherefore, for each of said reasons, the Petitioner respectfully prays that this Court may issue its Writ of Certiorari to grant him appropriate relief in this case.

Leo S. Julian

Jay F. Darlington

Attorneys for Petitioner.

APPENDIX.

District Court's Opinion.

(Title Omitted.)

This case involves transactions covering a long period of time—from 1930 until the present—and a brief history of the principal facts seems pertinent.

Sol Meyer, when a young man and a resident of Indianapolis, Indiana, married Florence Strauss, the daughter of a wealthy family in Washington, D. C. They began their married life in Indianapolis but, like many others, spent the winter season principally in Miami, Florida, and where eventually they resided permanently. In 1925 or slightly prior thereto, Sol Meyer, with a cousin, Sol Kiser, organized the Meyer-Kiser Bank in Indianapolis, Indiana, and soon thereafter, the Meyer-Kiser Bank in Miami, Florida. In addition to these banking institutions Meyer and Kiser had several other corporations and partnerships dealing in real estate, insurance and short loans.

On May 12, 1931 both the Meyer-Kiser banks were closed and receivers appointed. From 1930 to 1932 banks failed all over the United States, many of them because of the depreciated value of collateral and through no fault of the officers. A suit was filed under the stockholders liability statute by the receiver of the Miami bank against Ferd S. Meyer, son of Sol and Florence Myer, alleging that he was the owner of a large block of stock consisting of 1131 shares in the Miami bank, and on December 30, 1932, judgment was rendered against him for a sum in excess of $100,000. On September 18, 1933, Ferd S. Meyer filed a petition in bankruptcy and received his discharge

March 13, 1934. An action was instituted against Sol Meyer by the receiver of the Indianapolis bank charging misappropriation of funds, and in October, 1938, judgment was rendered in the state circuit court against Sol Meyer for a sum in excess of $800,000, which judgment was affirmed by the Supreme Court in 1941. After recovering said judgment the receiver sued Sol Meyer upon the judgment, in this court, Meyer having become a resident of Miami, and recovered a personal judgment against him in this court on January 30, 1939.

Prior to 1931, at the suggestion of Florence Meyer, Ferd S. Meyer organized the Family Loan Company, a Florida corporation, (hereinafter referred to as the Loan Company), with the capital provided by Florence Meyer. When Ferd Meyer secured the charter he provided for the temporary issuance of stock as follows: Ferd S. Meyer, 98 shares; W. C. Chadwick and A. M. Reder, one share each as qualifying stockholders. At the request of Florence Meyer, on the same day the stock was first issued, it was reissued to: Florence Meyer, 97 shares; Ferd S. Meyer, W. C. Chadwick and A. M. Reder, one share each as qualifying stockholders. But the stock was regarded at all times as belonging to Florence Meyer.

On January 16, 1932, Florence Meyer organized the Florence Meyer Trust (hereinafter referred to as the Trust), providing all of the capital and designating Sol Meyer and Ferd S. Meyer as trustees, and the beneficiaries as Sol Meyer, Jr., Edward Meyer, sons of Sol and Florence Meyer, and James M. Meyer, the minor son of Ferd Meyer. This Trust was created for the primary purpose of providing for the comfort, education and living expenses of Sol Meyer, Jr., and Edward Meyer, who because of physical disabilities from childhood were incapable of caring for themselves. From time to time the

trustees made investments, some of which were made in the preferred stock of the Loan Company, which stock was later recalled and in lieu thereof debenture notes of the Loan Company were issued. The trustees remained the same until the death of Sol Meyer in November, 1939, and thereafter Ferd Meyer acted as sole trustee until James M. Meyer, his son, became of age and was appointed an additional trustee under the terms of the Trust. The Trust funds, as far as the record discloses, were invested in accordance with the best judgment of the trustees, and the funds therefrom were expended for the beneficiaries from time to time.

On March 4, 1949 the present suit was filed by R. E. Peckham, assignee for the creditors of the Meyer-Kiser Bank, succeeding Thomas E. Garvin, receiver of the Meyer-Kiser Bank of Indianapolis. An amended complaint was filed on March 14, 1949, and an intervening claim on May 13, 1949. The complaints and intervening claim alleged the judgment in the Indiana court against Sol Meyer and the subsequent personal judgment against him in this court, the plaintiff succeeding to all right thereunder by assignment from the receiver of the Indianapolis bank. It further alleged that Sol Meyer conspired with the other defendants to conceal his assets from the payment of said judgment in that all, or the major portion, of the capital invested in the Loan Company and the Trust was in fact the property of Sol Meyer, and therefore the assets of the Loan Company and the Trust were subject to the payment of the judgment. That while Ferd S. Meyer filed a petition in bankruptcy and received his discharge in 1934, he fraudulently failed to list as his personal assets his holdings in the Loan Company and therefore said discharge is no bar to an action against Ferd Meyer on the judgment

against him in the Florida Court. That said judgment was assigned by R. E. Peckham by Harold C. Costello, J. H. Chance and Vera Chance, the three stockholders who succeeded to the assets of the Augusta Holding Corporation when it dissolved, said judgment having been purchased by Augusta when the assets of Ferd Meyer, bankrupt, were sold at public auction. The plaintiff seeks to pursue the assets of the Loan Company and subject the interest of all the other defendants in its stock, debentures, notes and evidence of indebtedness to the payment of plaintiff's judgments against Sol Meyer and Ferd Meyer.

The various defendants have filed their answers.

Defendants Rosalyn A. Meyer, wife of Ferd Meyer, and James M. Meyer, their son, deny generally the allegations of the amended complaint and allege that each of them individually has been and is a stockholder of the Loan Company, but both deny that they are stockholders by virtue of any transfer or assignment of anything of value from Sol Meyer to them, and further deny that either of them held any of the stock or debentures of said company in trust for Sol Meyer or his estate, or anyone other than in their own right.

The Loan Company filed its answer denying that Sol Meyer at any itme was ever a holder of record of common or preferred stock or the debentures of said corporation, either directly or indirectly; that Sol Meyer promoted or helped to promote the organization of said company or that he was the actual or equitable owner of any part of the capital which went into said corporation; and further, that Sol Meyer loaned or furnished additional monies or properties to said corporation.

Ferd S. Meyer in his answer individually denies the material allegations of said complaint and specifically

denies that said Sol Meyer had anything to do with the organization or promotion of the Loan Company, or was ever the owner of any of the common or preferred stock or the debentures of said Loan Company; that Sol Meyer ever gave or transferred to him any funds for investment in said Loan Company in any capacity. He admits that judgment was rendered against him individually in the Circuit Court of Dade County, Florida, on December 30, 1932, but alleges that he was duly adjudicated a bankrupt and discharged thereafter in Cause No. 1368-M in this court on March 13, 1934. This defendant further alleges that in his bankruptcy schedules he listed all liabilities of every nature and character including the above judgment and, therefore, the plaintiff is barred not only by the statute of limitations but by his discharge in bankruptcy.

Answering defendant Hoke T. Maroon denies that Sol Meyer beginning in the first part of 1930 and continuing thereafter until his death in 1939, promoted the organization and business of the Loan Company; that Sol Meyer ever owned any of the common or preferred stock or debentures of said company but says that Sol Meyer was an employee of said company on a nominal salary but did not promote the company, was not the directing head, and was not the actual or equitable owner of any portion of the capital which went into said company; that this defendant never received any monies, property or thing of value from Sol Meyer, and did not then and does not now hold anything of value from Sol Meyer, or his estate or his heirs.

The defendants Ferd S. Meyer, James Meyer and H. T. Maroon filed their answer as trustees denying that they have ever, jointly or severally, concealed or assisted in concealing in any manner whatsoever any assets which, either legally or equitably, were the property of Sol

Meyer. They answer as trustees making the same admissions and denials as were made in their individual answers.

On October 25, 1954, the plaintiff filed a supplement to his amended complaint and a supplement to his intervening claim in which he made the following additional defendants: Family Loan Company, a Florida corporation, incorporated on or about October 9, 1953; Seaboard Finance Company of Florida, a Delaware corporation, admitted to do business in Florida on or about March 25, 1950; Seaboard Finance Company, a Delaware corporation, believed to be the parent corporation and owner of the capital stock of said Seaboard Finance Company of Florida; and Town Finance Company, Inc., a Florida corporation, incorporated on or about April 29, 1953. In this supplemental complaint the plaintiff alleges that the original defendant Family Loan Company caused a conversion or change in form of the res or assets sought to be reached in this action from the stock and obligations of one or more of the above-named additional corporate defendants and that thereby the original defendants have converted or attempted to convert the stock and obligations sought to be reached in the original complaint into the stock or obligations of one or more of said additional corporate defendants. And that said transfers were fradulent and made for the purpose of concealing the assets of the original defendants.

In answer to the supplemental complaint the defendants Family Loan Company, a dissolved Florida corporation; Fred S. Meyer, individually and as trustee; Rosalyn A. Meyer; James Meyer, individually and as trustee; Hoke T. Maroon, individually and as trustee; and the additional defendants, Family Loan Company, a Florida corporation organized in 1953 by Seaboard and Town

Finance Company, a Florida corporation, allege that the defendant Ferd S. Meyer and James Meyer, as trustees of the Florence S. Meyer Trust, received payment in full for all debentures of the original Loan Company held by them as trustees and that said monies have been reinvested in debentures of the Town Finance Company. The defendant Hoke T. Maroon, as trustee for his brother, states that he does not hold or ever did hold any property in trust for Sol Meyer during his lifetime or for Ferd Meyer, and does not and has not held title as trustee to any property in which either of them had or has any beneficial interest. The defendants Ferd S. Meyer, Rosalyn A. Meyer, James Meyer and Hoke T. Maroon individually say that for a good and valuable consideration, consisting of capital stock in Seaboard, they with other stockholders of the Loan Company, sold, transferred and conveyed their holdings in said Loan Company to Seaboard Finance Company of Florida or Seaboard, and that these defendants now own the stock so issued to them individually as their individual holdings except for such shares as have been sold by some of the defendants individually upon the open market. These defendants and each for himself individually say that their respective individual holdings of the corporate stock or debentures of the Loan Company were their own property and were never the property of Sol Meyer, deceased, nor of any one claiming by him, through or under him and that neither Sol Meyer nor anyone in his behalf furnished the assets which caused such stock or debentures to be originally issued, and that said defendants' present holdings in Seaboard are not a result of any assets claimable by the plaintiff.

Seaboard Finance Company, Seaboard Finance Company of Florida, and Town Finance Company, Inc., answering the amended and supplemental complaints and

intervening claims deny that they or either of them have become fraudulent transferees of the assets sought to be reached in the amended complaint and intervening claim, and deny that they have joined, aided, and abetted any of the parties hereto in the concealment of said assets. Further answering, these defendants say that the defendant Seaboard on April 20, 1953, entered into a written contract with Ferd S. Meyer and Hoke T. Maroon, individually and as agents for certain stockholders of the Family Loan Company for the purchase by said Seaboard of all the issued shares of capital stock of said Loan Company, copy of which contract was attached to their answer, and state further that said sale was for full and valuable consideration, conducted at arm's length in good faith, without any fraud, collusion or guile on the part of Seaboard, and without any purpose or intent on its part to hinder, delay or defraud the plaintiff and without any knowledge of any fraudulent intent, if any, on the part of Ferd S. Meyer and Hoke T. Maroon.

It is apparent from the pleadings that the sole issues in this case are as follows: (1) Did any of the funds of Sol Meyer, either directly or indirectly, go into the capital of the Loan Company? (2) Did any of the funds of Sol Meyer constitute any part of the capital of the Trust, or did he at any time contribute to the estate of the Trust? (3) Was the bankruptcy proceeding of Ferd S. Meyer legal in all respects, or was it a fraudulent proceeding? (4) Did the defendants or any of them conspire with Sol Meyer, or with each other, to conceal the assets of Sol Meyer or Ferd S. Meyer after the failure of the banks?

The burden of proof is upon the plaintiff to prove the allegations of his original, amended and supplemental complaints and the amended and supplemental intervening claims by a preponderance of the evidence. If Sol Meyer

was not the actual or equitable owner of all or a portion of the assets of the Loan Company and the Trust, and if Ferd Meyer had no interest in the Trust except as trustee, and no interest in the Loan Company until 1940 (as is hereinafter explained), then no recovery could be had against Ferd S. Meyer or the Loan Company. And in that event, no judgment could be recovered against any of the defendants. The fact that Sol Meyer and Ferd Meyer were the trustees of the Trust, if their actions in connection with said Trust were merely as trustees, would not be evidence of any personal financial interest in said Trust.

The trial of this case lasted twelve days. The only witnesses offered by the plaintiff were Ferd Meyer and Hoke T. Maroon, who were cross-examined as adverse witnesses in regard to the organization and records of the Loan Company, the Trust, and all other organizations with which the witnesses had had any connection. They also were examined in detail as to the financial record of Sol Meyer and particularly as to whether or not he was interested in any way in the organization or operation of the Loan Company and the Trust. The evidence was that after the failure of the banks he was practically insolvent, his only income being from nominal salaries and transactions on the stock market.

The stock of the Loan Company, as hereinbefore stated, was originally issued after the preliminary organization as follows: Florence Meyer, 97 shares; and one share each to Ferd Meyer, W. C. Chadwick and A. M. Reder, as qualifying stockholders, or a total of 100 shares. But it was understood at all times that these shares were owned by Florence Meyer. Subsequently 50 shares of Florence Meyer's stock were sold to different individuals but by

October, 1940, said 50 shares had been purchased by the Trust. Florence Meyer transferred her remaining 47 shares to Rosalyn Meyer, wife of Ferd Meyer. About this time Hoke T. Maroon purchased 25 shares of stock from the Trust. Rosalyn Meyer transferred to Ferd Meyer 40-2/3 shares of her 47 shares of stock and the Trust also issued 25 shares to Fred Meyer, as trustee for James Meyer, one of the beneficiaries under the Trust. Rosalyn Meyer also sold to Hoke T. Maroon 5-1/3 shares, leaving her share. When Chadwick and Reder severed their connec. on with the Loan Company they surrendered their two qualifying shares to Florence Meyer, which she reissued to Hoke T. Maroon as qualifying shares, when Maroon became the active secretary and treasurer of the Loan Company. These two qualifying shares held by Maroon and the one qualifying share held by Ferd Meyer were then surrendered to Florence Meyer, were sold by her to the Trust, and were purchased from the Trust by Hoke T. Maroon. Thus on October 19, 1940, the distribution of the 100 shares of the Loan Company was: Hoke T. Maroon, 33-1/3 shares; Fred Meyer, 40-2/3 shares; Ferd Meyer, as trustee for James Meyer, 25 shares; and Rosalyn Meyer, one share, which constituted the entire capital stock of the Loan Company.

Approximately 1946, Harry J. Herff, Charles T. MacDermott and James A. Dunn became stockholders and directors of the Loan Company, each one purchasing two per cent of the capital stock, which had been surrendered two per cent from Hoke T. Maroon and four per cent from Ferd Meyer.

During this time the stock was increased from 100 shares to 91,000 shares but the distribution remained in the same proportion as above indicated. In 1953 the stockholders of the Loan Company made a contract with Sea-

board, whereby they surrendered their 91,000 shares of stock in the Loan Company for 60,000 shares in Seaboard, which shares were divided among the stockholders in proportion to the stock held as indicated above.

When the exchange of stock was made with Seaboard, Ferd Meyer and Hoke T. Maroon organized the Town Finance Company and the former stockholders of the Loan Company, who were so inclined, invested in the Finance Company either in stock or debentures.

There was no evidence introduced that Sol Meyer ever had any interest, either directly or indirectly, in the Loan Company or the Trust, except as a trustee. And the evidence showed that the only interest Ferd Meyer had in the Loan Company other than the one qualifying share was after October, 1940, by virtue of the stock which was given him by his wife, Rosalyn Meyer.

From the preponderance of the evidence, the Court finds that Florence Meyer was the sole contributor to the assets of the Florence Meyer Trust, and that it was organized for the purposes above indicated.

The bankruptcy proceedings of Ferd Meyer have been attacked in the pleadings of the plaintiff, alleging that Meyer did not disclose all of his assets in the bankruptcy schedules, and particularly his interest in the Loan Company. The complete bankruptcy file was offered in evidence. The pleadings admitted the judgment against Ferd Meyer in the state court for a sum in excess of $100,000, and filing of the petition in bankruptcy on September 18, 1933, and the discharge on March 13, 1934. Ferd Meyer testified that he listed every dollar of his assets; that he had no interest in the Loan Company except the one qualifying share which actually belonged to his mother, and that he became a stockholder in 1940 when he received 40-2/3 shares from his wife, Rosalyn Meyer.

The Court finds that the bankruptcy proceedings were regular; that there is no evidence that Ferd Meyer did not disclose all of his assets; and that the discharge in bankruptcy is a bar to any recovery sought in this case as to Ferd Meyer.

The Court further finds that the plaintiff has failed to show by a preponderance of the evidence, or by any credible evidence, that there was a conspiracy between Sol Meier and Ferd Meyer and the other defendants, or any of them, to conceal the assets of either Sol Meyer or Ferd Meyer.

The Court further finds that the transaction between the stockholders of the Loan Company and Seaboard was free from fraud and was a legitimate transaction.

At the conclusion of the introduction of evidence on behalf of the plaintiff, the defendants offered no evidence but moved for judgment on the record.

The motion is sustained and judgment is rendered for all of the defendants. Findings of fact, conclusions of law, and a proper form of judgment, consistent with this opinion, may be submitted.

EDGAR S. VAUGHT
United States District Judge

Dated this 19th day
of March, 1957.

(Clerk's Tr. 1662-1673)
R. 162-163

Decided Jan. 20, 1959.

Rehearing Denied April 3, 1959.

Before RIVES, TUTTLE and JONES, Circuit Judges.

JONES, Circuit Judge.

On March 1, 1959, the appellant commenced the suit which is now before us on appeal. Under the former equity practice the complaint would have been called a creditor's bill. The case has been before this Court on two other occasions. Peckham v. Family Loan Company, 1952, 196 F.2d 838; Idem 1954, 212 F.2d 100. The last of the pleadings was filed on November 19, 1954, and the cause was then at issue. The issues are made apparent in the prior opinions of this Court and in the reported opinion of the district court: Peckham v. Family Loan Co., 52 F.Supp. 169. Nearly two years later, on November 7, 1956, notice was given that the case was set for trial on February 25, 1957. A pretrial conference was had on January 31, 1957. At the pretrial conference the motion of appellant, filed September 15, 1950, was discussed and rulings were made by which production was required of most, but not all, of the documents requested by the appellant. At the pretrial conference one of appellant's counsel stated that he would be unable, because of other cases pending in other courts, to prepare this case for trial within the time remaining before the trial. The court indicated its view that there had been and would be ample time and opportunity for preparation and that a motion for continuance, if made, would be denied. Such a motion was made and was denied. The trial lasted twelve days. The reporter's transcript of the trial is in thirteen volumes with an aggregate of 1480 pages. At the conclusion of appellant's case the court announced that judgment would be entered for the appellees. A motion for a con-

tinuance, then made by the appellant, was overruled. A judgment was entered for the appellees. The appellant moved for a new trial and his motion was denied. In addition to the court's opinion, cited *supra*, findings of fact and conclusions of law were made in which the matters set forth in the opinion were in some respects amplified. On this appeal from the judgment the appellant raises a number of questions.

[1, 2] The contention upon which the appellant places the greatest stress is that he was denied a fair and adequate trial by the court's refusal to grant continuances, the court's refusal to allow prolonged questioning of witnesses, and the court's refusal to require production of documents. The granting or refusal of a motion for a continuance rests within the sound discretion of the trial court and its ruling on such a motion will not be disturbed on appeal unless an abuse of discretion is shown. Girard Trust Co. v. Amsterdam, 5 Cir., 1942, 128 F.2d 376. When the case was set for trial it had been pending for more than seven and a half years, the last pleading putting the case at issue had been on file for nearly two years, and more than three and a half months remained before the trial during which preparation could have been made for it. Although it was stated that one of appellant's counsel had other cases requiring his attention, it was not shown that these matters prevented the making of proper preparation for trial. See 17 C.J.S. Continuances § 38, p. 219. Clearly there was no abuse of discretion in the denial of the motion during the trial. As the trial was concluding a continuance was sought for the purpose of calling as witnesses two of the defendants. They were not subpoenaed and no statement was made as to what testimony was expected from them. A continuance was also sought to secure the testimony of a person who was ill. No sub-

poena was issued for this person, no effort was made to procure his deposition and no statement was made as to the evidence expected from the person whose testimony was desired. It was also asserted that the continuance was needed to permit the appellant to procure from some of the appellees documents to be used as evidence. It was not known to the appellant what these documents would disclose and no adequate reason was given for failure to make an earlier effort to make them available. A court could not be expected, under the circumstances here shown, to delay or continue a trial in order to permit a party to make preparation for trial. Agronofsky v. Pennsylvania Greyhound Lines, 3 Cir., 1957, 248 F.2d 829. There was no abuse of the trial court's discretion in denying the applications of the appellant for continuances.

The appellant specifies error because of the court's pre-trial ruling denying the request for the production of documents in the possession of one or another of the appellees. Those which the court declined to require the appellees to produce were determined by the court to be irrelevant. So also does appellant complain that the court denied his requests made during the trial for production of documents which the court held were not relevant or were shown not to be in the possesion of the appellees. No error is made to appear.

[3] The first witness called by the appellant was the appellee, Ferd S. Meyer. On the third day of the trial, while this witness was on the stand, counsel for the appellant was directing his inquiries to the partial assignment of a certificate for forty-seven shares of Family Loan Company stock. The assignment was made in 1940 and was of shares evidenced by a certificate in the name of Rosalyn Meyer, the wife of the witness. It was suggested by appellant's counsel that the signature of a witness to

the assignment had been removed by ink eradicator and another signature added. The witness had no recollection of the use of any ink eradicator. The court asked what difference it made and counsel answered that it made a great deal. Being again asked he answered that "it is elementary in the books that any alteration of an instrument, particularly unexplained by the signor, is in itself a badge of fraud or possible badge of fraud." Without any effort being taken or thereafter made by the appellant to show the materiality of evidence of eradication or alteration of the instrument, the trial proceeded through eight more days. As the appellant's case was winding up his counsel said he had arranged to have an expert witness attempt to determine and demonstrate whether the signature of the attesting witness had been eradicated and if so, to attempt to restore it. It was proposed that this experiment would be conducted in the courtroom. Counsel stated that he had reason to believe the expert could show the signature was not that of Ferd S. Meyer but of his father, Sol Meyer, who had died prior to the date the assignment bore. It was the theory of the appellant, as stated in its brief, that Sol Meyer had Rosalyn Meyer endorse the certificate in blank, signed it as a witness and kept it as his own until his death. The trouble with this theory is that there was no evidence introduced to support it. The trial court concluded that if the experiment was made and the result was as the appellant predicted it would make no difference. The court declined to delay the trial and permit the experiment to be made. We think there was no error in the court's ruling. If the fruits of such an experiment would have been material the proposal to have it made should not have been postponed until the trial was concluding; if immaterial it would have been properly rejected at what-

ever stage of the trial it had been proposed.

[4, 5] The appellant asserts that he was harrassed and belittled by the court. He points to the pages of the record where the court commented upon the time consumed by the appellant in developing immaterial evidence, and to the court's refusal to permit continued questioning of witnesses as to matters previously covered in detail. It is the judge who presides at a trial. He is not only empowered to keep a case moving within the bounds of reason but it is his duty to do so. See 53 Am.Jur. 87, Trial § 97. Such admonition of counsel as may be required for this purpose is proper. 53 Am.Jur. 83, Trial § 90. There was no improper conduct or comment of the trial judge.

[6] The trial court declined to hear oral argument of counsel at the close of the trial. This, the appellant says, was error. If argument is granted in a non-jury case it is as a privilege and not as of right. The matter of permitting argument is within the court's discretion. 89 C.J.S. Trial § 576, p. 353. Here the court had concluded that the appellant had produced no evidence of the fundamental allegations of his complaint. The court's opinion shows that it had full knowledge of the facts alleged and of the facts proved. There was no error in the court's refusal to hear argument.

[7] It is claimed by the appellant that he had made a prima facie case by the evidence produced and that it was error to enter judgment for the appellees. We cannot agree. The judgment, we think, was a proper one. See Peckham v. Family Loan Co., D.C., 109 F.Supp. 52. There was no error in overruling the motion for a new trial which raised the same questions as are presented on this appeal. Other questions raised need not be discussed. The judgment of the district court is free from error and is

Affirmed.

Note: In the following pages it will be apparent that the bold face headings are not part of the Record but are Petitioner's indication of what he thinks the quoted Record shows. Matter in parenthesis is interpolated to connect the quoted part with the preceding Record. All italics are ours.

Trial Judge Assuming Role of Defense Counsel, interrupting Plaintiff's Examination of Defendant-Witness Ferd S. Meyer:

Q. (by plaintiff's counsel on direct, to defendant-witness Ferd S. Meyer) I am not talking about investments. I mean, did she Florence Meyer, engage, take part in *any* kind of *business* that you recall?

(Florence was the wife of judgment debtor Sol Meyer,—it being the defendants' contention that she, rather than Sol, organized Family Loan Company and originally owned its capital stock sought to be reached in plaintiff's suit as the concealed property of Sol).

A. I don't recall her having *any* regular job *any* place.

Q. You do recall that regularly she was *home taking care of the family?* Is that correct?

A. *That was her primary business, yes.*

"The Court: Do you recall whether or not your mother had an *independent estate* at that time?

The Witness: Yes, she did.

The Court: Her parents were *wealthy people?*

The Witness: *They were.*

Q. (by plaintiff's counsel), Mr. Meyer, from what source did she get this independent estate?

A. *I don't know.*

The Court: Did she *inherit* it from her parents or did she . . .

The Witness: *I do not know*, Your Honor. I know she was a very thrifty woman and I know she saved her money. Where she may have accumulated monies from, *I don't know* and I never did know. I know she always had monies that she was willing to *give me* when my father turned me down. (Our italics).

Trial Tr. 108-9.

Judge Exhibits Bias, and Prejudges a Major Issue:

The Court: (to plaintiff's counsel during direct examination of same witness Ferd S. Meyer): Is it *your contention* now that any part of this *Florence Meyer Trust*, the capital of that trust, *came* from the bank *or from Sol Meyer?*

Mr. Darlington: It is our contention that *every penny* that was ever in it, except maybe a little jewelry of slight value, *was Sol Meyer's money* and was put in . . .

The Court: That is perhaps an *imaginative result*. There is no evidence *so far* that that occurred. (Our italics).

Trial Tr. 133.

Judge Again Exhibits Bias in Favor of Defendants:

Q. (plaintiff's direct examination of same witness Ferd S. Meyer): Are you able to give us any *explanation* as to why Chadwick *signed* the minutes as *chairman* which you identified on the second page and *then his name had been crossed out* of the list of those present?

A. *No. I can't.* He may have been present. It occurs to me that that's about the time Mr. Maroon was taking over the active operation of the Family Loan Company from Mr. Chadwick. Mr. Chadwick had been more or less the supervisor up to them, and I think from that time forward Mr. Maroon took over.

The Court: How is that material?

Mr. Darlington: Your Honor, in this kind of a case, a plaintiff cannot expect any direct admissions against interest by the witness and . . .

The Court: You ought to base it on something other than *just mere suspicion*, you know.

Mr. Darlington: It is something other, and let me refer your Honor to that famous statement of Justice Storey which is quoted in so many of the cases to this effect: Concealment and secrecy are the handemaidens of fraud. Very seldom can a plaintiff produce direct proof or testimony of fraud, but circumstances which may appear trivial in themselves may in their corelation with other circumstances in the case ultimately produce conviction exceeding all testimony.

The Court: While that is very important, nothing is more important than to *charge a man with fraud unless you are able to prove it.*

Mr. Darlington: I consider that the charges were well-founded at the time the complaint was filed, and as my

investigation proceeds and the evidence develops, I am increasingly convinced of that and I hope to be able to convince your Honor. Of course, it would not have been appropriate for me in the opening statement to list a great many separate details that I expected . . .

The Court: *There is nothing in what you have produced here this afternoon* getting down to facts. There is not a single statement there which you could construe as fraud in any way.

Mr. Darlington: It is not merely the written statements. It is the fact that *there is a certain pattern* of alterations. I am not asking Your Honor to make a finding upon these alone. Naturally, I expect to produce a further pattern of alterations and circumstances arising partly from the records of the defendants and partly from their testimony, the circumstances contained in their testimony.

The Court: Very well. *Let us get along* and let us *have the evidence*. (Our italics).

Trial Tr. 170-172.

Judge Again Intervenes with Leading Questions to Defendant-Witness Ferd S. Meyer and Draws Self-Serving Answers on Ultimate Fact Issue.

The Court: (during plaintiff's direct examination of same witness Ferd S. Meyer): At this point, this may have been covered by your testimony yesterday, but I think the question was asked you, to your knowledge *did Sol Meyer* (witness father and judgment debtor) *make any investment* in the *stock* of the Family Loan Company?

The Witness: *No*, sir, he did not.

The Court: *Ever* at any time?

The Witness: *Never* at any time.

The Court: Did *you*, (also a judgment debtor) make an investment in the loan company *prior* to the time that *you* and your associate *assumed* the *active* management of this company? Was there any investment made in that?

The Witness: No, sir. That was all that was put in. I had one share which my *mother gave me* as a part of the qualifying shares, and which was *disposed of by me about a year after she gave it to me*. Except for that one share, I had nothing invested in the Family Loan Company *until Mr. Maroon and I were interested in it in 1940*. (Our italics).

The Court: You may proceed. (Direct examination continued).

Trial Tr. 217-18.

Judge Considers Plaintiff's Question to Defendant-Witness concerning latter's Fraud is "Ridiculous" and "Out of Line".

Q. (plaintiff's direct examination of same witness Ferd S. Meyers): This *certificate No: 10* is endorsed on the back "Ferdinand S. Meyer surviving trustee." That is *your* handwriting, is it not?

A. Yes, it is.

Q. It is written in *pencil*. Is there any reason for your writing it in pencil rather than pen?

A. No special reason.

Q. For instance, was it written in pencil to show that the signature could be—

Mr. Bonsteel: Your Honor, we cannot hear counsel.

Mr. Darlington: I am sorry.

Q. Was it written in pencil for the *purpose* of making the signature *so it colud be erased* at a later date if desired and another name such as Sol Meyer's name as trustee substituted?

Mr. Ward: *If your Honor, please.*

The Court: *I think the question is ridiculous.* I do. *I think your question is out of line.*

Mr. Darlington: If your Honor please, there will be other evidence . . .

The Court: I understand, but I do not think you have *any right to ask a witness if he is a crook on the witness stand.* He is *your* witness now. (Our italics).

Trial Tr. 233-4.

Judge: "What difference" if Ink Eradicator was used on Defendant's Certificate of Stock Sought to be Reached by Plaintiff. "Let's go to Something Else."

Q. Mr. Meyer, will you please think back and tell us if you recall anything about you yourself using any ink eradicator at that place. (On stock Certificate No. 7 allegedly fraudulently transferred to cheat plaintiff).

A. No, I do not.

The Court: That answers your question.

Q. Are you able to say positively whether you did or not use—

A. I have no recollection of using any ink eradicator. I don't know.

Q. Did it ever come to your knowledge that Hoke T. Maroon had used any ink eradicator there?

A. No, sir. I know of no one; no one at all.

Q. No one at all who used ink eradicator?

A. I know of no one. I know nothing about it.

Q. At the time you signed your name over that place, did it come to your attention that ink eradicator had

blotted out part of the green engraving at the place where you were signing?

A. I wouldn't know whether I noticed it or not. It wouldn't mean anything if I did.

Q. Did it?

The Court: *What difference* would it make?

Mr. Darlington: It makes a great deal.

The Court: What is it? *Let us know what it is.*

Mr. Darlington: In the first place, let me say, Your Honor, *I do not think that Your Honor should very far interrogate me along these lines and compel me to—*

The Court: Just a minute. Let us get down to the fact. You asked him the question if he knew anything about it, and he said he did not know anything about it; that he did not remember anything about it. What more can you ask him on that? He answered your question.

Mr. Darlington: If Your Honor please, I did not intend to ask him any more along that line. *Your Honor asked me what difference it made,* and the answer was going to be from me that first it is *elementary* in the books that *any alteration* of an instrument; *particularly unexplained by the signor,* is in itself a *badge of fraud* or possible badge of fraud.

The Court: Let us go to something else. He answered your question.

Defendants' Counsel Starts Personal Attack on Plaintiff's Counsel.

Mr. Darlington: Mr. Ward, *I accept your tender.* Will you *please hand me the stock book and stubs and cancelled certificates covering the period from 1940 to 1950?*

Mr. Ward: Mr. Darlington, you are playing on words. You are not being fair to me and *not being fair to the Court.* You know that *those are not available.* They *have*

not been available. All *others* were available. I *was talking* about the accountant's records. You are trying to impose upon this Court the idea we are holding out about five or six years of some cancelled stock certificates that you know no one can find, and you have been advised of that.

I think, your Honor, *this man's attitude* before the Court and before counsel *should be brought into this record.* He has *not complied with a single ruling* that Your Honor has made when Your Honor told him today what you wanted to be produced, and *he has not even paid any attention to Your Honor's instructions* as to how to proceed in this case.

The Court: Let us get along.

Mr. Darlington: *Thank you,* Your Honor. I will.

Judge Makes his own Objections and then Sustains Them.

Q. (plaintiff's direct to same witness Ferd S. Meyer): You do recall they (stock certificates issued to dummies for Florence Meyer Trust) were *specifically* set up that way. Now, just tell us *what events* you recall.

The Court: He has told you what happened. Your question now is purely *argumentative.* He *has* related exactly what happened as he remembers it.

Mr. Darlington: *But I want to get all the facts as to who said* and *did* what and *who did* it.

The Court: No. *An objection will be sustained by the Court.* It is immaterial.

Mr. Darlington: If Your Honor please, I expect to prove the materiality of these circumstances before I get through. I expect to support my theory that *these were five dummies* that were put on this stock record *to cover up Sol Meyer's ownership of this stock.*

The Court: *Objection is sustained.* It is immaterial. *Your statement is out of line.* Trial Tr. 286-7

Defendants' Counsel Renews Personal Attack on Plaintiff's Counsel—Court thinks Plaintiff's Direct Examination is "Ridiculous".

Q. (plaintiff's direct, same witness Ferd S. Meyer): You were *president* at that time. Your father was dead?

A. *I sold a lot of Seaboard stock* (sought to be reached in plaintiff's suit). I *haven't the slightest idea what I may have sold or bought,* and *I don't know what I paid for it* much later than that. I don't know.

Q. Your father on this date had passed away, and you were the sole surviving trustee. Is that right?

A. That's right.

Q. You were the only representative that this trust had. Your mother and father were dead. You were the *surviving trustee.*

Mr. Ward: If Your Honor please, this is arguing.

The Court: Yes. That is pure argument.

Mr. Darlington: I will withdraw it. I want to find out *what his recollection is* as to *whether* (co-defendant) *Hoke Maroon* gave him *as trustee* of this trust *one dollar or ten thousand dollars* or what.

Mr. *Ward:* Let me just *speak for a minute. This man* here, this *gentleman, so-called,* from Indiana, *got the permission* of this Court *to appear down here.* I have been in this Court for thirty-five years, and *I have never heard anything like this before. He* will *not pay any attention* to what Your Honor rules, and what Your Honor says. He has *had* these papers *all submitted* to him. There are *final figures* on record, and he just keeps on trying to harass this witness. There are other defendants in this case, and we respectfully *ask that the Court restrict his so-called cross examination* of his own witness when *he knows* that the facts and the records and the evidence, the stipulated facts, are all here. He is just trifling with the Court.

The Court: Gentlemen, it is always embarrassing for the Court *to reprimand an attorney in court.* But I think a *lawyer with the practice that you have ought to know how to conduct yourself in court,* and I do not hesitate at all to say to you, sir, that many of these questions are not only immaterial, but *they are bordering on the ridiculous.*

You ask him the question as to whether he signed it. He answers you "Yes." Then you ask, "*Why* did you sign it?"

That is purely argumentative.

Mr. Darlington: May I say this: *I have been attacked here in a personal way by Attorney Ward. Somebody needs to be reprimanded,* but it is Mr. Ward and not me, *and I will not pursue that further.* If Mr. Ward wants to make that kind of record for himself, all right.

Now, then, as to me, Your Honor, I have been working as *hard,* as *respectfully,* as I know how to do it in thirty years of practice, *and every question I have asked has had a purpose,* and when the Court requested it, I have indicated the purpose.

Simply because I am trying to put in *circumstantial* evidence *or make a record on it,* at least *under Rule 43C and D* does not mean that I should be reprimanded.

The Court: No. I do not want to reprimand you at all. I just want you to limit your questions to the issues in this case. I think you have gone entirely too far on some of your *cross* examination. It is repetitious.

We will take a recess at this time. (Our italics)

Trial Tr. 328-330.

Judge again Makes and Sustains Objections to Plaintiff's Direct Examination on Exchange of the Stock sought to be Reached in Plaintiff's Suit.

The Witness: (same witness Ferd S. Meyer, direct): We had the usual talk about the loan business *in general*. Then he told us the fact that he had sold his companies recently in New York, in the New York area, to Seaboard.

He said, "I think *I can get you fellows a similar deal*, which I consider a very good one."

We said, "We are always interested in listening to what anybody has to offer us."

He made *certain suggestions*. He made certain long-distance calls, and *that's about the substance* of the arrangements that were eventually made which *resulted* from those conversations.

The Court: Was anything definitely said in that as to the terms under which you would make a sale?

The Witness: Yes, that we would exchange our stock in the Family Loan Company (sought to be reached by plaintiff's suit) for stock in the seaboard Finance Company, for which *we would get so many shares* of Seaboard Finance Company stock for each share that we had in Family Loan Company stock. The deal eventually resulted in a total amount of sixty thousand shares of stock of Seaboard in exchange for, I think, our ninety-one thousand shares of Family Loan Company.

* * *

Q. You say he stated he thought he could get a *similar deal* for you (to exchange stock sought to be reached by plaintiff). Did he tell you *the nature of the deal* that he had made with Seaboard?

A. He did.

Mr. Bonsteel: If the Court please—

The Court: I think now you are going too far. He has answered your question and told you what the con-

versation was and what the final deal was. I do not care what kind of clothes they had on when they were talking or whether or not they were *bare-headed* or *had on suits.* Those things are immaterial.

Mr. Darlington: If your Honor please, I have not asked questions of that character. The *sale of the res,* the property, the stock sought to be reached in this case, is directly in issue under the complaint and supplemental complaint, the intervening claim and the supplemental intervening claim. Here is—

The Court: What is it that you want to ask him now?

Mr. Darlington: I want *everything that was said between those men in that meeting that he remembers.*

The Court: *You will not be permitted to do that.* He has told you the substance of that conversation, what they said generally. *To ask him what each one said, I am not going to permit you to go that far.*

Mr. Darlington: If Your Honor please, let me respectfully *move the Court to reconsider* that ruling on this ground. That with any witness, and particularly an adverse witness, under Rule 43C and D, I am not shut off—

The Court: Just a minute now. He has told you what occurred there. I will not permit you *go to fishing* all over the place.

Mr. Darlington: May I at least, Your Honor, *make my record here?* I am in the process of moving the Court to reconsider the preceding ruling and stating the grounds for it, as I was—

The Court: No—

Mr. Darlington: It is on the ground—

The Court: I am not going to permit you to do that. *I want you to go ahead with this lawsuit.* We are just wasting time here. That is all there is to it.

Mr. Darlington: Your Honor, I respectfully urge that I should at least be permitted to *state the grounds*—

The Court: *I do not care to hear that at all.* There is no basis for it. (Our italics.)

Trial Tr. 381, 382-4.

Judge, on own Motion Shuts off Plaintiff's Direct Examination of Defendant Regarding his Dealing with S.E.C. concerning Stock Sought to be Reached.

Q. (Plaintiff's direct, same witness Ferd S. Meyer): You *mentioned* the getting of the *Securities and Exchange Commission's approval* (for issuance of the exchanged stock sought to be reached by plaintiff). What part did *you* have in getting that approval?

A. None at all.

The Court: How is that material? It is *not* at all. It has *nothing to do* with the case.

Mr. Darlington: I think it does.

The Court: I know you do, but the Court thinks differently. *Do not pursue that any further.*

Trial Tr. 410-11.

Court on own Motion Shuts off Plaintiff's Examination of Defendant regarding latter's Disposal of part of stock sought to be Reached.

Q. (Plaintiff's direct, same witness Ferd S. Meyer): *With whom* have you had transactions relative to that thousand or two thousand shares (of Seaboard stock sought to be reached in plaintiff's suit)?

The Court: *What difference* does that make? How is that material?

Mr. Darlington: It might bear upon *the true ownership* or, I think, it would furnish a *circumstance* in this entire picture showing where the truth lies.

The Court: It is immaterial what he did with it. He testified he got it.

Mr. Darlington: His *ownership* is in issue.

The Court: He has told you he does not have it—he sold it, *disposed of it.*

Mr. Darlington: He did not say he sold it. He said he *disposed* of it in *some* manner, as I understood it.

The Witness: I meant that I sold it through a *New York Stock Exchange* brokerage house.

Mr. Darlington: *Named what?*

The Court: *We will recess* and reconvene at two o'clock.

Trial Tr. 419-20.

Judge, in Adverse Attitude, Shuts off Plaintiff's Direct Examination of Defendant-Witness Maroon concerning Defendants' Conduct with S.E.C. regarding Stock sought to be Reached by Plaintiff.

Q. (plaintiff's direct examination of defendant-witness *Maroon*): Without going into other documents at the present time, is it also true that neither you nor Ferd Meyer nor anybody on the Family Loan side *played any part* in the filing of any papers with the *Securities and Exchange Commission* relative to this sixty thousand shares of *Seaboard* stock?

Mr. Budd: I will object to the question as being repetitious and immaterial.

The Court: Objection sustained. It is *immaterial.*

Mr. Darlington: It is at least not repetitious.

The Court: It is immaterial.

Mr. Darlington: It goes to the *circumstance* that *if* these gentlemen *concealed the existence* of this case from the *stock exchanges or the SEC*, it is a *circumstance* constituting a strong *admission* by them by *conduct* against interest.

The Court: The Court is through with that. *There is nothing to your contention, sir.* I would like to have some evidence in support of your allegations.

Mr. Darlington: Well, all I can say is that—

The Court: You have alleged here—

Mr. Darlington: All I can say is I think what I have offered *would furnish strong circumstantial evidence* in addition to what is already in.

The Court: There is nothing there that even bears on this other question. The question is, what money, if any, did *Sol Meyer* put into this Family Loan corporation or into this trust.

Mr. Darlington: If Your Honor please, it is our theory, at least, that *conduct* of this kind by Sol Meyer's *transferees* or by *Ferd Meyer*, speaking of the intervening claim, is a *strong implied admission of guilt.*

The Court: No, there is nothing to that at all. *There is no basis for your statement.*

Trial Tr. 482-3

Judge joins Defense Counsel in Personal Disparagement of Plaintiff's Counsel.

Q. (plaintiff's direct, same witness—defendant Maroon): Do you know the source from which these two stock books that we have here, Exhibit 1 and Exhibit 2 and Exhibit 2 is the first common stock book and Exhibit 6—Do you know the *source from which those came to Attorney Ward's office*, where I saw them first briefly the afternoon of January 31 of this year, as has been mentioned?

Mr. Budd: (one of defense counsel): Your Honor, I will object to that question.

The Court: Yes, I think so.

Mr. Budd: I want the Court to know that this attorney was present and opened the box containing all of

these exhibits himself. He knows from the address and return address on those things exactly where those documents came from.

Mr. Darlington: Mr. Budd is half right and half wrong.

The Court: It is immaterial. The question is immaterial.

Mr. Darlington: Your Honor, a statement has been made here *which reflects on my personal veracity*, and I just want to *clarify* it.

The Court: *I do not want to hear* any more about it. I want to try the issues in this lawsuit.

Mr. Darlington: So would I.

The Court: Let us get along.

Mr. Darlington: Every so often *I have to defend myself* against some personal reflections.

The Court: *There might be some ground for it*, but let us get to something else. I do not care to go into that.

Mr. Darlington: Does Your Honor have in mind anything which Your Honor thinks is *ground* for these personal reflections of counsel on me? If so, I would like to know *what* it is.

The Court: I have no idea at all about it.

Trial Tr. 522-3

Judge takes over Defendant-Witness Maroon with Leading Questions on a Main Issue—then Disparages Plaintiff's Counsel again.

The Court (taking over defendant-witness Maroon during plaintiff's direct): Let us go ahead with it.

In that connection, I think it is already in evidence—I am not sure whether I asked you this question or not, but you have been connected with this Family Loan from its beginning, have you not?

The Witness: Almost from its beginning, Your Honor. I do remember definitely from 1933.

The Court: Do you know of any money that was ever put into the Family Loan Company prior to 1940 as capital, *except* the $1,000 *furnished by Frances Meyer?*

The Witness: Florence Meyer, Your Honor, provided *the* original $1,000.

The Court: Florence Meyer, yes.

The Witness: There were certain investments in preferred stock certificates—

The Court: I am just talking about the capital stock now.

The Witness: That's all that was provided, Your Honor, $1,000 from Florence Meyer.

The Court: Were you *there* at that time?

The Witness: *No*, Your Honor. That happened *before* I came in.

The Court: But *that* is as you *remember* it?

The Witness: As I remember the *records*, it *showed* that $1,000 had been provided by Florence Meyer, and there is no other capital funds that were put in. The capital, the common capital of the company, remained at $1,000 until 1939 or '40.

The Court: Proceed.

Mr. Darlington: I wish to point out, to keep the record clear, that under Rule 43, or under other elementary principles of evidence in trials, *I am not bound* by the categorical statement of this witness.

The Court: No, no. *Your attitude* in this case is that you have put these witnesses on the stand but that *you do not believe anything that they said.*

Mr. Darlington: That is not an accurate statement of my attitude.

The Court: But you are not bound by anything that they say.

Mr. Darlington: I have a right to contradict and im-

peach their statements in full or in part, and I am relying on Rule 43 and related principles.

The Court: Let us go ahead.

Trial Tr. 531-3.

Judge Refers to judgment debtor Sol Meyer as "The Poor Old Man was Broke",—thereby disclosing Bias and Sympathy in favor of the Defendants and Prejudging a basic fact issue in the case.

Mr. Darlington: May I respectfully urge that this *stock* is material.

The Court: Not one bit of it unless you can show that Sol Meyer had some interest in this stock, some of his money went into it or some connection, none of this would be material, and I have permitted that that go in on the theory that you are attempting to connect Sol Meyer with it in some way.

Mr. Darlington: I think I have. I have him drawing a *salary* there for *doing little or nothing.*

The Court: The poor old man was broke. He was down and out. He had an Indiana judgment against him of $800,000. He could not pay his life insurance premiums. His wife had saved her estate. She had protected it and put it in this trust. *Now what would you have done* under the same circumstances? They would have to take care of him some way. *I think* it is perfectly clear why they did it.

Mr. Darlington: I think when the evidence is all in it *now* written on there in the *hand of Ferd Meyer* with a

Trial Tr. 815

Court again shows Bias and Sympathy for Defendant Maroon,—shows Resentment of Charges of Fraud against Defendants.

Mr. Darlington: Your Honor, I am in a peculiar position. There are some more questions I want to ask this witness regarding some of the people who came in as officers and stockholders during the period between 1947 and 1953 and who went during that period.

The Court: That would be wholly immaterial. It is wholly immaterial. That is years after Sol Meyer's death, nearly ten years after his death.

Mr. Darlington: They will be asked for the purpose of *supporting the charge* of juggling, concealment and manipulation of the *stock*.

The Court: I know those terms. *I do not appreciate your using those terms.* There is no evidence here to support it. I do not want you going into that any further.

Mr. Darlington: So far as the terms are concerned, the terms manipulation and concealment are used in the *complaint* and *intervening claim*.

The Court: I know, but you put a man on the stand here and accuse him of juggling and being dishonest and making false statements. I do not appreciate that method of handling a case.

Mr. Darlington: I can only say I have not addressed any of those remarks to Mr. Maroon. I have simply answered the Court and stated what the complaint and intervening claim charge. There is nothing personal in it.

The Court: When you ask a witness "Did you sign that affidavit?" and he says "Yes, I did. That is my signature," and you say "*Was that affidavit true* that you signed?", what other construction can you put on it? Your line of examination is wholly improper and *the Court does not appreciate it*.

Go ahead with your case.

Mr. Darlington: Certainly in a case of this type I should be permitted to prove that any testimony or *affidavits* or other statement is *false*. I would not know how to try a *fraud case* otherwise.

Mr. Ward: I object to the statement and move to strike it. This is not a fraud case. He has not shown any semblance of a fraud. His continued statement is an *insult to the Court*.

The Court: Let us get on with the case. (Our italics).

Trial Tr. 859-61

The next 500 pages of Trial Transcript are largely filled with similar prejudicial matters and rulings against the plaintiff, but it seems unnecessary to extend this Appendix by setting them forth, so we pass to the closing day of the trial:

Court's Refusal to Permit Plaintiff to Call Expert Witness to Show Fraudulent Alteration of Stock Certificate.

The Court: What else will you have?

Mr. Darlington: Well, Your Honor, *I had arranged to have here the witness Joseph Nichol* whom I previously mentioned for the purpose of qualifying him briefly as an *expert* upon inks and erasures by chemical means, restoration of them and trying to get the Court's permission for him to *take this original common stock book of Family Loan Company*, Exhibit #2, and see if he can, without leaving the court corridors, *restore the original eradicated signature and date on the endorsement on the 47-share certificate of Rosalyn Meyer*.

The Court: *We will not go into that*. That is immaterial. That would be absolutely immaterial.

Mr. Darlington: I have reason to believe *I could show that instead of it occurring in October 1940* as is now written on there in the *hand of Ferd Meyer* with a

pencil, that the true date was prior to Sol Meyer's death and that instead of the witness being what is now written on there, the signature of Ferd Meyer, *that the witness was Sol Meyer.*

Mr. Ward: It would not make a bit of difference.

The Court: Not a bit. That is *preposterous.* You are *just speculating* on a proposition now. The Court *will not go into that.* It would not make any difference.

Mr. Darlington: I respectfully submit that I have good reason to believe that based upon the other documents in the case—

The Court: It is your supposition. That is all. It is *just suspicion.* There is *no basis for your statement whatsoever.*

Mr. Darlington: May I suggest that if it is baseless it could do the defense no harm to let the true signatures be brought out.

The Court: These experts—*I do not care* to go into that at all. There is *no need to say why,* but if that is all you have *you will not be permitted to do that.*

Trial Tr. 1444-5.

Court's Refusal to Permit Plaintiff to Complete His Direct Examination of Defendant Maroon.

Mr. Darlington: If your Honor please, I am requesting that the witness *Hoke Maroon* return as early as he is obtainable *so that I may complete my examination of him.*

The Court: *You are through today. You are through now.* You have had twelve days here now to examine those two men and three-fourths of your time has been spent in repetitious questions, matters that have been already gone into, *so I am not permitting* you to call Mr. Maroon *and I am not going into this expert witness* about

the *transfer of the share* of stock which would *not make any difference* in this case.

Trial Tr. 1445-6.

Court's Refusal to Permit Plaintiff to Call Two Important Defendants as Witnesses (who had never yet testified).

Mr. Darlington: If Your Honor please, it had also been my intention to attempt *to obtain the attendance here of Rosalyn Meyer and James Meyer.* I did not serve them with subpoenas for today, however, because I estimated incorrectly that they would not be reached today *and I am not through with the plaintiff's case in chief,* if Your Honor please.

The Court: *Well, the Court is.* The Court is through with your case in chief. *I feel that you have been playing with the Court.* You have taken time here that is unnecessary. You have taken time here for twelve days, now on two witnesses. You have examined every paper and if you had just shown some evidence at all of the fundamental allegations of your complaint the Court would feel differently.

Mr. Darlington: As against the twelve days may I respectfully point out that Ferd Meyer and Hoke Maroon were the president and secretary-treasurer of this corporation and they are the principal individual defendants and that the events attempted to be covered in their examination have been over a span from 1920 to 1953 and subsequent to 1953, that the documents such as I have been able to obtain are necessarily somewhat extensive, and that in the light of that and the course which this trial is taking, as indicated by the record, *my examination and entire presentation of the case have been the best I know how to present them.*

Trial Tr. 1446-7.

Note: Contrary to the above aspersion on the good faith and trial conduct of plaintiff-intervenor's counsel, which had often been indulged in by the Judge, and sometimes by some defense counsel during the trial,—we believe the entire record will show that he was uniformly courteous to the Judge and opposing counsel, even in the face of personal abuse,—and that he gave no cause for these aspersions, except to continue trying in good faith to offer his evidence, in the face of great and unjust handicap.

Court Overruled Plaintiff's Oral Motion to Require Defendants to Produce Vital, Basic Stock and Corporate Records.

Mr. Darlington: * * * Your Honor, without waiving my protest against the ruling just made *closing* the plaintiff's case in chief, *I respectfully move* in the alternative that Your Honor do one of the following things alternatively: *First*, and preferably, *require the defendants to produce here for the plaintiff's identification and use in evidence Family Loan Company's stock records* which are *entirely missing* for the *decade 1940 to 1950*, and also *Family Loan Company's debenture records* which, except for offered #8 consisting of the last group of canceled debentures, *is entirely missing*, consisting of the debenture stubs originally issued and successively issued debentures. Also, Family Loan Company's *original ledger* and *journal* showing the original entries, *the receipt of money for its capital stock and other capital which went into it* by way of common stock and preferred stock and otherwise which would furnish evidence, I believe, as to who furnished the capital for Family Loan Company.

The Court: *You* would not believe it if they testified

to it. They have covered that. You spent a day or two on that one subject.

Mr. Darlington: I respectfully urge that I am not bound or precluded by the testimony of Ferd Meyer and Hoke Maroon who were distinctly adverse witnesses and who were called under Rule 43.

I am moving the Court to order the defendants to produce those records I have enumerated, which are *basic* and *essential*, and add to that *the cancelled preferred stock certificates* and the *remainder of the common stock record* beyond Exhibit #2. I say to Your Honor that those are *needed* and I am *entitled* to them on basic grounds in a case of this kind, that without the slightest criticism or inference against any counsel in the case, *the parties themselves have not satisfactorily explained their absence*, and I am asking the Court to order them to produce them, whoever has them, or to account satisfactorily for their absence.

That is my first alternative motion.

The Court: *Your proposition is overruled.* This *occurred in 1930 and 1931.* That is twenty-five years ago, twenty-six years ago.

Your motion is overruled. *The Court will not require them to do that.* They have all stated, every attorney here and everyone else, that they have no knowledge of any other records except those that have been produced.

Mr. Darlington: It is not a question of the attorneys, if Your Honor please, it is a question of the parties.

The testimony of Ferd Meyer and Hoke Maroon indicates very strongly that *all those records existed and were turned over to Seaboard.* Now Seaboard's *local* counsel here *obviously has no direct knowledge.*

The Court: The Court has ruled on that. *The Court is not going to order that done.*

* * *

Mr. Darlington: I do not know how I can make it clearer. *There is not and has not been* during this trial any *slightest inference by me against Attorney Bonsteel* (Seaboard's local counsel) *or any other attorney* in the case. I merely say this, and without questioning his good faith in what he has just said, it is apparent on the face of it that it comes by *hearsay*, by telephone and letters from Seaboard's executives and chief counsel, who would know, and yet *there is not a single affidavit or witness or any explanation from anybody in Seaboard who has actual first-hand knowledge of those facts.* That is my point.

The Court: The Court has ruled on that. What else is it you want?

Trial Tr. 1447-51.

Court Overruled Plaintiff's Motion for Continuance to Enable Him to Obtain the Non-Produced Defendants' Records.

Mr. Darlington: *The second alternative motion*, Your Honor is, the first one having been denied, that Your Honor at this point *continue this trial for a reasonable time to enable the plaintiff to do two things* which without his fault he has not been able to do in this trial, and that includes the intervenor; *first*, to make a *thorough preparation* of his factual matters for trial. I will not reargue that. That was settled by orders of the regular judge of this court before Your Honor sat on the bench as a total stranger to all of us and to the case on the day the trial started, but Your Honor taking cognizance of the prior record I think should grant me that, and also for the purpose of enabling me to attempt to locate by my own means these missing records.

I believe that given an opportunity I can find them and get them produced here. I had no reason to believe that they would not be here until their non-appearance during

the trial, and again, this is *without any inference against counsel*. I am only referring to the *parties*, Family Loan Company, Ferd Meyer, Hoke Maroon and Seaboard itself, and, Your Honor, in the light of those things, I think that Your Honor should grant my present motion to continue this trial for a reasonable time.

The Court: What do you mean by a reasonable time?

Mr. Darlington: I mean, Your Honor, at least thirty days.

The Court: No, no. *There will be no continuation.* We are trying this case now. *I will not be here* thirty days from now.

Mr. Darlington: I know the statute, the United States Judicial Code makes ample provision for that. It provides that when a judge is once assigned to the trial of a case and he takes jurisdiction of the trial—

The Court: There will be no continuation. *Get off that subject.* There will be no continuation. *We are finishing this case right now.*

If you have any further evidence *right now* to offer, all right. If you have *not*, why—

Mr. Darlington: Your Honor, within the confines of Your Honor's rulings and admonitions to me there is nothing that I presently have here to offer. It is *five minutes after four.* (P.M.) I had intended to attempt to secure the attendance of *Rosalyn Meyer* and *James Meyer*, possibly other witnesses tomorrow, as I have indicated, but at the moment there is nothing with which I can go forward.

Trial Tr. pp. 1451-1453.

The Court: I will give you ten minutes and this is the final recess.

We are going to finish this case today.

Trial Tr. p. 1458.

The Judge then announced that he would decide the case the next morning without argument, which he did.

Trial Tr. p. 1462.